

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs February 20, 2007

**STATE OF TENNESSEE v. GRADY LEE FLIPPO**

**Appeal from the Circuit Court for Bedford County**  
**No. 15879     Lee Russell, Judge**

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**No. M2006-01182-CCA-R3-CD - Filed June 6, 2007**

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The Defendant, Grady Lee Flippo, was convicted by a Bedford County jury of two counts of attempted aggravated assault, Class D felonies. For these convictions, the Defendant received sentences of three years and three years and six months to be served consecutively in the Department of Correction. In this appeal as of right, the Defendant presents the following issues for our review: (1) whether the evidence justified a jury instruction on the lesser-included offense of attempt; (2) whether the trial court erred by instructing the jury that attempted aggravated assault and simple assault were “equal in seriousness”; (3) whether the trial court erroneously applied an enhancement factor, i.e., the Defendant had no hesitation about committing a crime when the risk to human life was high; (4) whether the trial court erred in ordering consecutive sentences based on the factor that the Defendant was a dangerous offender; and (5) whether consecutive sentencing violated his right to a jury trial as set forth in Blakely v. Washington, 542 U.S. 296 (2004). Following a review of the record, we affirm the judgments of the trial court concerning the Defendant’s convictions and the lengths of the Defendant’s sentences. Because we conclude that the trial court improperly classified the Defendant as a dangerous offender, we reverse the trial court’s order of consecutive sentencing and remand for modification of the sentences to reflect concurrent terms.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed as  
Modified; Remanded**

DAVID H. WELLES, J., delivered the opinion of the court, in which THOMAS T. WOODALL and ALAN E. GLENN, JJ., joined.

Ted W. Daniel, Murfreesboro, Tennessee, for the appellant, Grady Lee Flippo.

Robert E. Cooper, Jr., Attorney General and Reporter; Preston Shipp, Assistant Attorney General; Charles Crawford, District Attorney General; and Michael D. Randles, Assistant District Attorney General, for the appellee, State of Tennessee.

## OPINION

### Factual Background

This case arises from a June 14, 2005 roadside altercation occurring on Highway 41-A just north of Shelbyville in Bedford County. On August 22, 2005, the Defendant was charged with two counts of aggravated assault by using a handgun to cause the victims to fear imminent bodily injury and one count of felony reckless endangerment by motor vehicle. See Tenn. Code Ann. §§ 39-13-101 to -103.

At the Defendant's trial on these charges, the following evidence was presented. On June 14, 2005, Mr. David K. Ensey (Mr. Ensey) and his twelve-year-old son, David Ryan Ensey<sup>1</sup> (David Ensey), were stopped on the side of Highway 41-A due to a flat tire on their trailer. They were attempting to load the trailer onto a larger trailer, when the Defendant, accompanied by two men, drove past them. Mr. Ensey said to his son, "That's Grady Lee; you know he's going to start something; get back in the truck."

Mr. Ensey testified that, when the Defendant realized it was him on the side of the road, the Defendant "stepped on his brake[,] . . . turned to the left side of the road, backed up and started back" towards the Enseys. The Defendant then pulled into a driveway "probably 50 feet up the road from" the Enseys and exited the vehicle "with his hand in his pocket." Mr. Ensey asked, "Grady Lee, do you want to talk to me?" The Defendant began cursing and said, "Yeah I do." According to Mr. Ensey, the Defendant then "come [sic] out with his . . . weapon" from "his right-front pocket" and pointed the weapon at Mr. Ensey and his son. Mr. Ensey provided the following account of what transpired next:

When he . . . pulls the gun out, as high as I ever see it, gets it about here to my son's face. It's right up here in front of my—and I said "Get down." And I leaned over and pulled him to the floorboard and I never looked back. I pushed the gas and went just as hard as I could go, pulling a big long trailer.

Mr. Ensey stated that the Defendant "got [his vehicle] out of that road pretty fast" and that he kept looking for the Defendant in his rearview mirror as he drove away. Mr. Ensey turned off of Highway 41-A once he was behind a hill that blocked the Defendant's "line of sight[.]" While traveling down Dunaway Road, Mr. Ensey encountered a city police officer, flagged him down, and informed him of the situation. The officer said to Mr. Ensey, "I'll be up here at the end of the road at the highway waiting on you. I've got help on the way. You go up there and turn all that around somewhere and I'll meet you back up there." As Mr. Ensey was trying to find a place to turn around, he again encountered the Defendant, who was "coming around the curve." According to Mr. Ensey, once the Defendant rounded the curve and saw the Enseys, the Defendant "start[ed] off on [Mr. Ensey's] side of the road[.]" and the Defendant was not "driving in a way that" Mr. Ensey could have just passed him and continued on. Mr. Ensey turned into Johnny Mills' driveway in order to avoid

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<sup>1</sup> The witness' name also appears as David Earl Ensey in portions of the record.

the Defendant. Once in the driveway, Mr. Ensey jumped out of the vehicle with his son and ran to the front door of the home in an effort to get to safety. The Defendant then twice passed by Mr. Mills' house and waved.

Once the Defendant passed for the second time, Mr. Ensey, believing that the Defendant had left the area, proceeded to meet the city officer waiting for him on the side of the highway. Once there, a county officer arrived and took Mr. Ensey to identify the Defendant, who had been located and detained by law enforcement.

Mr. Ensey testified that he was afraid when the Defendant pulled a gun on him on Highway 41-A and again when he met the Defendant several minutes later in his lane of traffic "headed straight towards him." Mr. Ensey also stated that his son was extremely frightened during the incident and still suffered from nightmares.

Mr. Ensey made several calls to authorities during this altercation, but his phone "kept breaking up in that area for some reason." Two of the calls that went through were recorded, and the recordings were entered into evidence.

Mr. Ensey testified that animosity had arisen between himself and the Defendant over possession of a 1959 Chevrolet truck. Two or three weeks before the June 14 altercation, Mr. Ensey had received information from Jerry Owens that the Defendant was in possession of the truck. Mr. Ensey encountered the Defendant pulled over on the side of the road and stopped to ask the Defendant about his truck. He asked the Defendant, "You don't know anybody that's got any parts for a '59 Chevy, do you?" to which the Defendant responded, "Yeah, I got a whole truck." Mr. Ensey then inquired, "Where did you get that truck?" and the Defendant replied that he got the truck from Jerry Owens. Mr. Ensey said, "That's my truck; I've got the title to it." The Defendant proceeded to get out of his vehicle and "reached in his pocket . . . ." Mr. Ensey testified that the Defendant fell getting out of his truck, and he and his son ran to their vehicle and drove away.

Twelve-year-old David Ensey testified that he had been working with his father on June 14, 2005, and on their way home, their trailer had a flat tire. They went home to get a bigger trailer to carry the smaller trailer. When they returned to load the smaller trailer, they saw the Defendant, who "kind of went off the road a little bit and turned around and pulled in the drive." His dad told him to "[j]ump in the truck." David Ensey testified that his father "said nicely [to the Defendant,] 'Do you want to talk to me?'" The Defendant then "pulled his hand out" of his right front pocket, and David Ensey "saw a handle of a gun." His father was "[p]ushing [him] down" as he got in the truck and sped away from the Defendant. David Ensey testified that he was scared when he saw the Defendant "pull his hand out of his pocket and . . . had a gun in his hand . . . ."

According to David Ensey, his father turned off the highway, and they flagged down a police officer and told him what happened. After talking to the officer, they went up the "road a little further and turned left." They then saw the Defendant, who came "[s]traight at" them, pulled into their lane of travel, and "blocked the road." His father shoved him down again. They pulled into

Johnny Mills' driveway and "jumped out[,]" and Mr. Mills let them inside. According to David Ensey, his father had been attempting to contact police during the entire incident and, once at the Mills' home, his father was able to connect with authorities on his cellular telephone. The Defendant drove past the Mills' house twice before leaving the area. David Ensey testified that he was scared "the whole time" these events were taking place.

David Ensey also testified about the incident between his father and the Defendant occurring several weeks prior to June 14. He stated that, on this occasion, his father and the Defendant were talking about parts for a pickup truck. The Defendant stated that he had a "whole truck." His father then asked where the Defendant got the truck and said to the Defendant, "Well, that's my truck." The Defendant then fell down getting out his vehicle, and they "took off."

Officer Sam Jacobs of the Shelbyville Police Department testified that he was on his way to work on June 14, 2005, when he encountered the driver of van with his hand out the window "trying to flag [him] down." Officer Jacobs testified that Mr. Ensey told him that the Defendant "had just pulled a gun on him up on Highway 41-A." Officer Jacobs stated that Mr. Ensey "appeared to be pretty shaken up . . . like someone that was . . . genuinely scared or frightened." The boy in the truck also appeared "really shook up." Officer Jacobs instructed Mr. Ensey to turn around and meet him at the end of the road "to escort [Mr. Ensey] back down to 41-A where it occurred." Eventually, Mr. Ensey and his son met Officer Jacobs at the meeting place. Thereafter, Chief Deputy Sam Brady arrived and assumed control of the investigation because the altercation occurred in the county—the jurisdiction of the sheriff's department.

David Sakich of the Bedford County Sheriff's Department testified that, on June 14, 2005, he was "listening to the radio" and heard that authorities were looking for the Defendant, who was allegedly in possession of a gun and had chased the victims down Dunaway Road. Officer Sakich knew the Defendant and proceeded to a location where he believed the Defendant might be found. He located the Defendant about twelve minutes after hearing the "radio traffic . . ." The Defendant and two other occupants were still inside the vehicle. The Defendant denied that he had a gun; officers were unable to locate a weapon in the Defendant's vehicle or on his person; and the Defendant was placed under arrest and taken to the Bedford County Sheriff's Department.

The defense called David Smith to testify on the Defendant's behalf. Mr. Smith stated that he had just started working for the Defendant on June 14, 2005. He testified that he was riding down Highway 41-A with the Defendant and John Wilhoit, that they were in the Defendant's vehicle, and that the Defendant was driving. Mr. Smith saw a man—who he identified as Mr. Ensey—beside a white van on the side of the road waving at them, and they stopped. Mr. Ensey said to the Defendant, "Do you want a piece of me?" Words were exchanged; the Defendant then got back in the vehicle; and they drove off.

Mr. Smith testified that he was showing the Defendant where he lived when they again encountered the Enseys. Mr. Ensey "swerved in front of [the Defendant's vehicle] into a driveway." The Defendant then proceeded on to the Wilhoit residence, where the three men were surrounded

by law enforcement. The three men were ordered to get out of the vehicle and were put on the ground while the police searched for a weapon. No weapon was found. According to Mr. Smith, he never saw the Defendant brandish a weapon or dispose of a weapon on June 14. Mr. Smith testified that, to the best of his knowledge, there was not a firearm in the Defendant's possession or inside the vehicle on June 14.

The Defendant testified on his own behalf. He stated that he had been working with James Wilhoit and David Smith on June 14, 2005. That afternoon around 5:00 p.m., he was headed north on Highway 41-A when he saw a white van stopped on the side of the road. David Smith informed the Defendant that "somebody was wai[v]ing, or trying to flag [them] down." The Defendant "hit the brakes and three mail boxes up . . . turned left into a driveway . . . ." According to the Defendant, the white van then "pulled up on the opposite side of the road[,] and Mr. Ensey exited the vehicle and said to the Defendant, "Do you want a piece of me?" The Defendant "grabbed the door handle of [his] pickup truck and said, 'Matter of fact, I believe I do.'" The Defendant stated his intention when he exited his vehicle "boiled down to [an] old fashioned ass whipping." In response, Mr. Ensey "took off flying down the highway . . . ." The Defendant claimed that he did not pull a gun on anyone that day.

The Defendant testified that he saw the Enseys again several minutes later when David Smith was showing him where he lived. According to the Defendant, Mr. Ensey was turning in a driveway and "had both lanes crossed." The Defendant "stopped dead still in the road" to try "to pick up what [Mr. Ensey] was intending to do next." After going into the driveway, Mr. Ensey and his son got out of the truck and ran toward the house. The Defendant stated that he then turned his vehicle around and proceeded to the Wilhoit residence, where he was surrounded by police who ordered him to get out of the vehicle. The officers asked the Defendant if he was in possession of a handgun, and the Defendant responded in the negative. He consented to a search of his vehicle, and no gun was found.

The Defendant also testified about the encounter several weeks earlier with Mr. Ensey on the roadside regarding the '59 truck. The Defendant stated that Mr. Wilhoit was driving his vehicle, when Mr. Ensey "pulled crossways in front of [his] truck . . . ." Mr. Ensey approached the Defendant and asked, "Have you got any parts for a '58 or '59 Chevrolet truck?" The Defendant responded, "I have no idea what's up there at the junkyard; you'll have to talk to my brother. The junkyard is his." Mr. Ensey became upset and accused the Defendant of stealing his pickup truck. Mr. Ensey then "popped [the Defendant] upside the jaw . . . ." The Defendant attempted to get out of his truck but fell down. While the Defendant was trying to get out of the truck, Mr. Ensey got in his vehicle and left.

The defense also called Jerry Owens to testify regarding the 1959 Chevrolet pickup truck. Mr. Owens testified that, although the truck did not belong to him, he was in possession of the truck for fifteen or sixteen years. Mr. Owens testified that Mr. Ensey brought the truck to him for him to paint it. After a while, Mr. Ensey asked about the truck, and Mr. Owens told Mr. Ensey that he needed more money to buy some materials but that Mr. Ensey never gave him any more money.

Several years later, Mr. Ensey stated to Mr. Owens that the truck “was not worth fooling with.” Four years after that, Mr. Owens had the Defendant remove the truck from his property. According to Mr. Owens, the Defendant wanted something in writing stating that removal of the truck was requested by Mr. Owens. Thereafter, Mr. Ensey came to Mr. Owens and inquired about his truck. Mr. Owens informed Mr. Ensey that the truck had been towed, and Mr. Ensey became upset and left. A piece of paper signed Mr. Owens requesting removal of the truck was entered into evidence.

Following the conclusion of proof, the Defendant was convicted of two counts of the lesser-included offense of attempted aggravated assault and was found not guilty of reckless endangerment. A sentencing hearing was held on March 4, 2006. The trial court sentenced the Defendant to three years for the attempted aggravated assault of David K. Ensey and three years and six months for the attempted aggravated assault of David Ryan Ensey. The Defendant was sentenced as a Range I, standard offender, and the sentences were to be served consecutively to one another for an effective sentence of six years and six months.

The Defendant filed a motion for new trial, which was denied. This timely appeal followed.

## ANALYSIS

### **I. Attempt Instruction**

The Defendant contends that the trial court erred by instructing the jury on the lesser-included offense of attempted aggravated assault. The Defendant was charged with aggravated assault by causing fear involving the use or display of a deadly weapon, and the trial court charged the jury on the lesser-included offenses of attempted aggravated assault, assault, and attempted assault. Specifically, the Defendant argues that

the evidence presented to the jury could not support the charge of attempted aggravated assault. . . .

. . . .

. . . [T]he jury clearly rejected the idea that [the Defendant] was guilty of aggravated assault. Depending on what evidence the jury believed, they could have concluded that [the Defendant] was guilty of simple assault, or nothing at all.

The State responds that the evidence was sufficient to support an attempt instruction.<sup>2</sup> We agree with the State that such an instruction was proper.

Under the test adopted in State v. Burns, an offense is a lesser-included offense if:

(a) all of its statutory elements are included within the statutory elements of the offense charged; or

(b) it fails to meet the definition in part (a) only in the respect that it contains a statutory element or elements establishing

(1) a different mental state indicating a lesser kind of culpability; and/or

(2) a less serious harm or risk of harm to the same person, property or public interest; or

(c) it consists of

(1) facilitation of the offense charged or of an offense that otherwise meets the definition of lesser-included offense in part (a) or (b); or

(2) an attempt to commit the offense charged or an offense that otherwise meets the definition of lesser-included offense in part (a) or (b); or

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<sup>2</sup> The State also argues that the Defendant has waived the issue for failing to object to the attempt instruction. However, after the trial court confirmed its intention to charge attempted aggravated assault, the following colloquy occurred:

[DEFENSE COUNSEL]: I have to—if they believed he had any gun, I could understand that. If they believe that [the Defendant] had a handgun with an attempt to commit an aggravated assault by a display of a weapon, what did he attempt to do? Put him in fear, or he attempted to use a deadly weapon.

And, so it's alright. You know, you would have to have an intent like that, attempted felony murder. I mean, you can't attempt an unattended [sic] crime. So if it's attempted aggravated assault by the display of a deadly weapon, you know, is it he intended to intimidate them by the display of a weapon, but didn't intimidate them, or he intended to intimidate them to fear unreasonable bodily harm because he wanted them to think he had a weapon.

THE COURT: Okay, I tell you what. I'm going to give this charge, and then if by some miracle what they convict him of is attempted aggravated assault, then you can move to dismiss the whole thing. How about that?

[DEFENSE COUNSEL]: All right.

Additionally, the Defendant challenged the attempt instruction and the sufficiency of the evidence supporting his conviction in his motion for new trial. We decline to find waiver of the issue.

(3) solicitation to commit the offense charged or an offense that otherwise meets the definition of lesser-included offense in part (a) or (b).

6 S.W.3d 453, 466-67 (Tenn. 1999). Attempt to commit aggravated assault is a lesser-included offense of aggravated assault under part (c)(2) of the Burns test.

However, the trial court is not required to instruct the jury on all lesser-included offenses. To determine whether the evidence justifies a jury instruction on a lesser-included offense, the trial court must employ the following two-step process adopted by our supreme court in Burns, 6 S.W.3d at 469, and incorporated into Tennessee Code Annotated section 40-18-110(a). First, the trial court must determine whether “the record contains any evidence which reasonable minds could accept as to the lesser included offense.” Tenn. Code Ann. § 40-18-110(a). “In making this determination, the trial judge shall view the evidence liberally in the light most favorable to the existence of the lesser included offense without making any judgment on the credibility of such evidence.” Id. Second, the trial court “shall . . . determine whether the evidence, viewed in this light, is legally sufficient to support a conviction for the lesser included offense.” Id.; see also Burns, 6 S.W.3d at 469.

Our supreme court has previously stated that, as a general rule,

[e]vidence sufficient to warrant an instruction on the greater offense also will support an instruction on a lesser offense under part (a) of the Burns test. In proving the greater offense the State necessarily has proven the lesser offense because all of the statutory elements of the lesser offense are included in the greater.

State v. Richmond, 90 S.W.3d 648, 660 (Tenn. 2000) (quoting State v. Allen, 69 S.W.3d 181, 188 (Tenn. 2002)). However, the general rule for lesser-included offenses under part (a) of the Burns test does not extend to lesser-included offenses under part (c). Id. at 662. “Establishing proof sufficient to convict under the greater offense will not necessarily prove the lesser offenses . . . enumerated in part (c) of the test.” Id. “[P]art (c) of the Burns test, which makes an attempt a lesser-included offense, applies ‘to situations in which a defendant attempts to commit . . . either the crime charged or a lesser-included offense, but no proof exists of the completion of the crime.’” State v. Marcum, 109 S.W.3d 300, 303 (Tenn. 2003) (quoting State v. Ely, 48 S.W.3d 710, 719 (Tenn. 2001)). In other words, an instruction on a lesser-included offense under part (c)(2) of the Burns test is not warranted unless a reasonable juror could have found that a defendant was guilty of attempt as opposed to the completed crime. Id. at 304.

The Defendant’s argument that “[t]here was either a completed aggravated assault, or there was no aggravated assault at all” is incorrect. As charged in the indictment, aggravated assault occurs when a person “[i]ntentionally or knowingly commits an assault as defined in § 39-13-101 and . . . [u]ses or displays a deadly weapon . . . .” Tenn. Code Ann. § 39-13-102(a)(1). An assault occurs when one “[i]ntentionally or knowingly causes another to reasonably fear imminent bodily injury . . . .” Id. § 39-13-101(a)(2). Criminal attempt requires that one act “with the kind of

culpability otherwise required for the offense . . . [and] with intent to complete a course of action or cause a result that would constitute the offense, under the circumstances surrounding the conduct as the person believes them to be, and the conduct constitutes a substantial step toward the commission of the offense.” Id. § 39-12-101(a)(3).

Viewed in the light most favorable to the prosecution, the evidence supports the jury’s verdict that the Defendant took a substantial step toward displaying a firearm. The victims were on the side of the road attempting to retrieve their trailer which had a flat tire. The Defendant drove past, slowed down, and parked. The Defendant exited his vehicle, and Mr. David K. Ensey asked the Defendant if he wanted to talk. At this time, twelve-year-old David Ryan Ensey testified that he saw the Defendant “pull his hand out from” his right front pocket and that he “just” saw the “handle of a gun.” The Enseys then sped away from the Defendant. The State noted during closing argument that, as David Ensey “saw it[,]” the Defendant was “pulling that pistol” on June 14. The fact that there was conflicting testimony regarding whether the Defendant actually completed the crime and displayed a weapon was an issue of witness credibility to be determined by the jury. The evidence at trial was sufficient to support the jury’s guilty verdict of attempted aggravated assault beyond a reasonable doubt. Accordingly, the trial court did not err in instructing the jury on the lesser-included offense of attempted aggravated assault.

## **II. “Equal in Seriousness” Instruction**

The Defendant argues that the trial court committed error in giving the instruction that simple assault is “equal in seriousness” to attempted aggravated assault. The Defendant contends that such error is of prejudicial dimensions because the question posed by the jury during deliberations “underlines [sic] the significance of sentencing in the minds of the jury. Furthermore, and the answer left them with no answer, other than the erroneous answer they already had in their instructions, that simple assault is ‘equal in seriousness to attempted aggravated assault.’”

The charge of the trial court regarding the lesser-included offense of simple assault states as follows:

Another lesser-included offense of aggravated assault is assault. This offense is equal in seriousness to attempted aggravated assault, so neither of these offenses is lesser than the other. If you have been required to determine the defendant’s guilt or innocence of attempted aggravated assault, then you must also determine the defendant’s guilt or innocence of assault. If you find the defendant guilty of both attempted aggravated assault and assault, the defendant can only be punished at his sentencing hearing for one such crime at that level of seriousness.

The jury asked the following question after it began its deliberations: “Is attempted and aggravated assault [sic] both felonys [sic] if so what may the time sentencing[?]” The trial court answered the question: “The law prohibits me from advising you whether the charges are felonies or misdemeanors and prohibits me from advising you what punishment any particular charge carries.”

The State responds that the issue is waived because the Defendant did not object to this instruction at trial or raise the issue in his motion for new trial. The State then concedes that the trial court's statement to the jury regarding the relative seriousness of assault and attempted aggravated assault was erroneous but that the error did not constitute plain error and the Defendant has not demonstrated that he did not object to the instruction for tactical reasons.

First, we note that the Defendant failed to cite to any authority in his brief, arguably waiving the issue on appeal. See Tenn. R. App. P. 27(a)(7); Tenn. Ct. Crim. App. R. 10(b). Nonetheless, the Defendant is correct that the trial court's statement regarding the relative seriousness of assault, a Class A misdemeanor, see Tenn. Code Ann. § 39-13-101(b)(1), and attempted aggravated assault, a Class D felony, see id. § 39-12-107(a), -13-102(d)(1), was erroneous. A defendant has the constitutional right to complete and accurate jury instructions on the law; the failure to do so deprives a defendant of the constitutional right to a trial by jury. State v. Teel, 793 S.W.2d 236, 249 (Tenn. 1990).

Jury instructions must be reviewed in the context of the overall charge rather than in isolation. See Sandstrom v. Montana, 442 U.S. 510 (1979); see also State v. Phipps, 883 S.W.2d 138, 142 (Tenn. Crim. App. 1994). A charge is prejudicial error "if, when read as a whole, it fails to fairly submit the legal issues or misleads the jury as to the applicable law." Phipps, 883 S.W.2d 142 (citing In re Estate of Elam, 738 S.W.2d 169, 174 (Tenn. 1987)).

The instruction in question must be reviewed in the context of the overall charge. The instructions on lesser-included offenses were given in "sequential" order and the pattern instruction on "order of consideration," see 7 Tennessee Practice, Tennessee Pattern Jury Instructions—Criminal 41.01 (7th ed. 2002), was given following the instruction on aggravated assault and then again following the instruction on simple assault.<sup>3</sup> The verdict forms reflect that the jury followed the proper order of consideration during deliberations. The verdict form for aggravated assault is marked not guilty, the verdict form for attempted aggravated assault is marked guilty, and the remaining forms for assault and attempted assault are not marked at all. In our view, the jury charge taken as a whole did not cause any confusion which would justify a new trial.

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<sup>3</sup> The trial court instructed the jury as follows:

If you have a reasonable doubt as to the defendant's guilt of aggravated assault as charged in the indictment, then your verdict must be not guilty as to this offense, and then you shall proceed to determine his guilt or innocence of the lesser-included offense of attempted aggravated assault.

If you have a reasonable doubt as to the defendant's guilt of assault, then your verdict must be not guilty as to this offense, and then you shall proceed to determine his guilt or innocence of the lesser-included offense of attempted assault.

### III. Sentencing

The Defendant contends that the trial court committed various sentencing errors. First, he argues that the trial court improperly applied an enhancement factor. Second, he alleges that the facts of this case do not warrant consecutive sentences. Third, relying on Blakely v. Washington, 542 U.S. 296 (2004), he submits that the imposition of consecutive sentences violated his constitutional right to a trial by jury.

At the outset, we note that, in response to Blakely, our legislature has recently amended several provisions of the Criminal Sentencing Reform Act of 1989, said changes becoming effective June 7, 2005. See 2005 Tenn. Pub. Acts ch. 353. The Defendant was sentenced according to the pre-2005 law, and both parties rely on pre-2005 law on appeal. However, the instant crimes occurred on June 14, 2005, and thus, our legislature's recent amendments are applicable to this case. This new act as amended by the legislature has been cited with approval by the United States Supreme Court. See Cunningham v. California, 549 U.S. --, 127 S. Ct. 856, 871 n.18 (2007). In Cunningham, the Supreme Court referenced these recent amendments to Tennessee law and stated that "[o]ther States have chosen to permit judges genuinely 'to exercise broad discretion . . . within a statutory range,' which 'everyone agrees,' encounters no Sixth Amendment shoal." Id. at 871 (quoting United States v. Booker, 543 U.S. 220, 233 (2005)).

Before a trial court imposes a sentence upon a convicted criminal defendant, it must consider (a) the evidence adduced at the trial and the sentencing hearing; (b) the presentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) evidence and information offered by the parties on the enhancement and mitigating factors set forth in Tennessee Code Annotated sections 40-35-113 and 40-35-114; (f) any statistical information provided by the Administrative Office of the Courts as to Tennessee sentencing practices for similar offenses; and (g) any statement the defendant wishes to make in the defendant's own behalf about sentencing. Tenn. Code Ann. § 40-35-210(b); see also State v. Imfeld, 70 S.W.3d 698, 704 (Tenn. 2002). To facilitate appellate review, the trial court is required to place on the record its reasons for imposing the specific sentence, including the identification of the mitigating and enhancement factors found, the specific facts supporting each enhancement factor found, and the method by which the mitigating and enhancement factors have been evaluated and balanced in determining the sentence. State v. Samuels, 44 S.W.3d 489, 492 (Tenn. 2001).

Upon a challenge to the sentence imposed, this Court has a duty to conduct a de novo review of the sentence with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d). However, this presumption "is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). If our review reflects that the trial court followed the statutory sentencing procedure, that the court imposed a lawful sentence after having given due consideration and proper weight to the factors and principles set out under the sentencing law, and that the trial court's findings of fact are adequately supported by the record, then the presumption is applicable, and we may not modify the sentence even if we would have

preferred a different result. State v. Fletcher, 805 S.W. 2d 785, 789 (Tenn. Crim. App. 1991). We will uphold the sentence imposed by the trial court if (1) the sentence complies with the purposes and principles of the 1989 Sentencing Act and (2) the trial court's findings are adequately supported by the record. State v. Arnett, 49 S.W.3d 250, 257 (Tenn. 2001). The burden of showing that a sentence is improper is upon the appealing party. Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments; Arnett, 49 S.W.3d at 257.

The presentence report reflects that the Defendant was forty-one years old at the time of sentencing. He did not finish high school and lived with his mother. The Defendant's mother, who suffered from degenerative bone disease, testified at the sentencing hearing that she "principally depend[ed]" on the Defendant "to take care of [her] day-to-day . . . living needs[.]" The Defendant had never married and had no children. He was self-employed and described his work as "moving homes, buying and selling homes, real estate, driving trucks and salvage work." The Defendant's criminal history included two traffic offense convictions, one conviction for worthless checks up to one hundred dollars, one misdemeanor failure to appear conviction, and four misdemeanor convictions for assault.

The Defendant had been receiving disability income for several years prior to his arrest for the instant crimes. He received a gunshot wound to the head on March 18, 2000, after arguing over a business transaction. The Defendant underwent several surgeries to correct damage caused by the gunshot wound. His injuries were still visible at the time of sentencing.

#### **A. Risk to Human Life Factor**

The Defendant contends that the length of each felony sentence was excessive. The Defendant was convicted of two Class D felonies as a Range I, standard offender. A Range I sentence for a Class D felony is two to four years. See Tenn. Code Ann. §40-35-112(a)(4).

A trial court shall impose a sentence within the range of punishment determined by whether the defendant is a mitigated, standard, persistent, career, or repeat violent offender. Id. § 40-35-210(c).

In imposing a specific sentence within the range of punishment, the court shall consider, but is not bound by, the following advisory sentencing guidelines:

(1) The minimum sentence within the range of punishment is the sentence that should be imposed, because the general assembly set the minimum length of sentence for each felony class to reflect the relative seriousness of each criminal offense in the felony classifications; and

(2) The sentence length within the range should be adjusted, as appropriate, by the presence or absence of mitigating and enhancement factors set out in §§ 40-35-113 and 40-35-114.

Id. Moreover, the sentence length within the range should be consistent with the purposes and principles of this chapter. Id. at (d).

In determining the length of the Defendant's sentence as to the attempted aggravated assault of David K. Ensey, the trial court found two enhancement factors were applicable: enhancement factor (1)—the Defendant had a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range; and enhancement factor (10)—the Defendant had no hesitation about committing a crime when the risk to human life was high. See id. § 40-35-114(1), (10). Regarding the attempted aggravated assault of David Ryan Ensey, the trial court found that, in addition to enhancement factors (1) and (10), enhancement factor (4)—the victim was particularly vulnerable because of age—applied. See id. at (4). The trial court found no applicable mitigating factors, see id. § 40-35-113, and imposed sentences of three years for the attempted aggravated assault of David K. Ensey and three years and six months for the attempted aggravated assault of minor, David Ryan Ensey.

Specifically, the Defendant contends that the trial court improperly applied enhancement factor (10)—the Defendant had no hesitation about committing a crime when the risk to human life was high—because risk to human life is an essential element of aggravated assault with a deadly weapon. In applying this factor, the trial court concluded, “We know that it was a relative but isolated situation out there. I think the risk was great.”

Our legislature has mandated that an enhancement factor may not be applied if the factor is an essential element of the offense as charged in the indictment. See id. § 40-35-114. In this case, the indictment charges the Defendant with aggravated assault by using a firearm to cause the victims to fear imminent bodily injury. Risk to human life is inherent in the use of a firearm. State v. Nix, 922 S.W.2d 894, 903 (Tenn. Crim. App. 1995). Therefore, enhancement factor (10) may not ordinarily be applied to enhance a defendant's sentence for aggravated assault. We also conclude that this enhancement factor is incorporated as an essential element of the offense of attempted aggravated assault by causing fear involving the use or display of a deadly weapon. However, an exception exists where a defendant's actions posed a high risk to the life of a person other than the named victim. State v. Imfeld, 70 S.W.3d 698, 707 (Tenn. 2002). While proof was presented that other motorists were on the road that day, there was no proof that the actions of the Defendant actually created a risk to the life of any other specific person. For this reason, we must conclude the proof was insufficient to support the application of enhancement factor (10) to the Defendant's convictions. See State v. Antray Terrill Morrow, No. W2002-02065-CCA-R3-CD, 2003 WL 22848974, at \*4 (Tenn. Crim. App., Jackson, Nov. 25, 2003) (citing State v. Hill, 885 S.W.2d 357, 363 (Tenn. Crim. App. 1994)).

The wrongful application of one or more enhancement factors by the trial court does not necessarily lead to a reduction in the length of the sentence. State v. Winfield, 23 S.W.3d 279, 284 (Tenn. 2000). This determination requires that we review the evidence supporting any remaining enhancement factors, as well as the evidence supporting any mitigating factors. Imfeld, 70 S.W.3d at 707.

The trial court placed particular emphasis on the Defendant's prior criminal convictions, specifically his four convictions for assault given that those convictions were "very similar" in nature to the offenses under review. David Ryan Ensey was twelve years old when the Defendant pulled a weapon on June 14, 2005. Likewise, we conclude that enhancement factors (1) and (4) justify the sentences imposed.

## **B. Consecutive Sentencing**

The Defendant argues that the trial court erred in ordering the two sentences for attempted aggravated assault to be served consecutively to one another. His argument against consecutive sentencing is two-fold: (1) the imposition of consecutive sentences violates his Sixth Amendment right to trial by jury as recognized by the Supreme Court's holding in Blakely; and (2) the record does not support the finding that he is a dangerous offender.

In State v. Gomez, 163 S.W.3d 632 (Tenn. 2005), our supreme court concluded that Tennessee's sentencing laws did not violate the dictates of Blakely, 542 U.S. 296. The United States Supreme Court recently vacated the judgment in Gomez and remanded that case to the Tennessee Supreme Court for further consideration in light of Cunningham, 127 S. Ct. 856. See Gomez v. Tennessee, 127 S. Ct. 1209 (2007). As previously noted, in response to the United States Supreme Court's decision in Blakely, the Tennessee Legislature amended the 1989 Criminal Sentencing Reform Act. See 2005 Tenn. Pub. Acts ch. 353. These amendments became effective on June 7, 2005, and have been cited with approval by the United States Supreme in Cunningham. Cunningham, 127 S. Ct. at 871. The instant crimes were committed after June 7, 2005, and our legislature's recent amendments are applicable to this case. Moreover, even prior to our supreme court's decision in Gomez, the Tennessee Supreme Court specifically noted that Blakely did not impact our consecutive sentencing scheme. See State v. Robinson, 146 S.W.3d 469, 499 n.14 (Tenn. 2004).

Tennessee Code Annotated section 40-35-115(b) provides that it is within the trial court's discretion to impose consecutive sentencing if it finds by a preponderance of the evidence that any one of the following criteria applies:

- (1) The defendant is a professional criminal who has knowingly devoted the defendant's life to criminal acts as a major source of livelihood;
- (2) The defendant is an offender whose record of criminal activity is extensive;
- (3) The defendant is a dangerous mentally abnormal person so declared by a competent psychiatrist who concludes as a result of an investigation prior to sentencing that the defendant's criminal conduct has been characterized by a pattern of repetitive or compulsive behavior with heedless indifference to consequences;

(4) The defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high;

(5) The defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims;

(6) The defendant is sentenced for an offense committed while on probation;  
or

(7) The defendant is sentenced for criminal contempt.

Tenn. Code Ann. § 40-35-115(b). These criteria are stated in the alternative; therefore, only one need exist to support the imposition of consecutive sentencing. State v. Adams, 973 S.W.2d 224, 231 (Tenn. Crim. App. 1997).

In State v. Wilkerson, our supreme court imposed two additional requirements for consecutive sentencing when the “dangerous offender” category is used: The court must find consecutive sentences are reasonably related to the severity of the offenses committed and are necessary to protect the public from further criminal conduct. 905 S.W.2d 933, 937-38 (Tenn. 1995). Although such specific factual findings are unnecessary for the other categories enumerated in Tennessee Code Annotated section 40-35-115(b), the imposition of consecutive sentences is also “guided by the general sentencing principles that the length of a sentence be ‘justly deserved in relation to the seriousness of the offense’ and ‘no greater than that deserved for the offense committed.’” Imfeld, 70 S.W.3d at 708 (quoting Tenn. Code Ann. §§ 40-35-102(1), -103(2)); State v. Lane, 3 S.W.3d 456, 460 (Tenn. 1999)).

The trial court imposed consecutive sentencing finding the Defendant to be a dangerous offender under Tennessee Code Annotated section 40-35-115(b)(4); the court did not explain its finding other than to state that “the defendant acted without hesitation where the risk to life was great,” nor did it make the requisite Wilkerson findings that the sentences were necessary in order to protect the public from the Defendant's further misconduct and the terms were reasonably related to the severity of the offenses. Wilkerson, 905 S.W.2d at 938. Because the trial court did not make the appropriate findings, we review the imposition of consecutive sentencing de novo with no presumption of correctness.

We conclude that the record does not support the imposition of consecutive sentencing. Neither victim in this case was physically harmed. The jury found the Defendant guilty of only attempted aggravated assault, i.e., the Defendant's conduct constituted a substantial step toward the commission of the offense. Moreover, the Defendant was acquitted of felony reckless

endangerment. The crime of attempted aggravated assault is inherently dangerous. The legislature has considered the nature of those crimes in establishing the appropriate sentence ranges and penalties. The circumstances surrounding this crime are not aggravated beyond that generally occurring in crimes of this nature. The presentence report reflects that the Defendant had no felony record; while his criminal history is sufficient to enhance the length of his sentences, it is not “extensive” as required for the imposition of consecutive sentencing. We reverse the trial court and order that the Defendant’s two sentences for attempted aggravated assault shall be served concurrently.

### **CONCLUSION**

Based upon the foregoing reasoning and authorities, we affirm the Defendant’s convictions for attempted aggravated assault and the length of the each sentence imposed. However, the record does not support the imposition of consecutive sentencing, and we must remand for entry of judgment forms reflecting that Defendant’s sentences are to be served concurrently rather than consecutively.

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DAVID H. WELLES, JUDGE